

**Mohd Faizol bin Mohamad v
Magistrate, Magistrate's Court, Kulim & Ors**

HIGH COURT (ALOR SETAR) — CRIMINAL APPLICATION NO 44-12
OF 1997

MOHD HISHAMUDIN J
23 MAY 1998

Administrative Law — Remedies — Habeas corpus — Applicant ordered to be detained at rehabilitation centre — Applicant denied right to make full and proper representation — Whether applicant should be applying for certiorari — Whether applicant was wrong in applying for writ of habeas corpus

The applicant was ordered to be detained at the Serenti Rehabilitation Centre by the magistrate pursuant to s 6(1) of the Drug Dependents (Treatment and Rehabilitation) Act 1983 ('the Act'). The applicant applied for the writ of habeas corpus for his release from the detention centre on the ground that he was denied the right to make a full and proper representation and that he was being unlawfully detained. The federal counsel raised a preliminary objection that the applicant was wrong in procedure in applying for a writ of habeas corpus to secure his release from the detention. It was argued that an order under s 6 of the Act, so long as it is proper in form and bears the signature and seal of the magistrate, could not legally be challenged by way of habeas corpus but only by way of certiorari.

Held, overruling the preliminary objection:

The submission of the federal counsel, if accepted, would be tantamount to this court taking a step backwards in terms of protecting the liberty of the subjects of this nation. The efficacy of the writ of habeas corpus would be seriously impaired and it would be a radical departure from the existing principles on habeas corpus. Such a proposition would be contrary to art 5 of the Federal Constitution which confers on a person the right to make an application for a writ of habeas corpus. In the circumstances, the applicant would not be proceeding on a wrong footing in applying for a writ of habeas corpus. The magistrate in issuing the detention order had committed a serious breach of procedure by denying the potential detainee the right to make a full and proper representation. The detention order would be of no effect as it was a defective order and any detention of a person under that order would be unlawful as it would be contrary to art 5 of the Constitution (see pp 446G-I and 447A-D).

[Bahasa Malaysia summary]

Pemohon diperintahkan supaya ditahan di Pusat Pemulihan Serenti oleh majistret menurut s 6(1) Akta Penagih Dadah (Rawatan dan Pemulihan) 1983 ('Akta tersebut'). Pemohon membuat permohonan writ habeas corpus untuk pembebasannya daripada pusat tahanan atas alasan bahawa ia tidak diberikan hak untuk membuat representasi

- A penuh dan sewajarnya dan bahawa ia ditahan dengan menyalahi undang-undang. Peguam persekutuan menimbulkan bantahan permulaan bahawa pemohon adalah salah dari segi prosedur dalam memohon untuk writ habeas corpus bagi menjamin pembebasannya daripada tahanan. Adalah diujahkan bahawa
- B perintah di bawah s 6 Akta tersebut, asalkan ia adalah sempurna dari segi bentuk dan membawa tandatangan dan meterai majistret, tidak boleh dicabar dari segi undang-undang menerusi habeas corpus tetapi hanya melalui certiorari.

Diputuskan, menolak bantahan permulaan:

- C Penghujahan peguam persekutuan, sekiranya diterima, adalah sama seperti mahkamah mengambil langkah ke belakang dalam ertikata melindungi kebebasan rakyat negara ini. Keberkesanan writ habeas corpus akan terancam dan ia merupakan penyimpangan yang radikal daripada prinsip-prinsip habeas corpus yang wujud. Cadangan
- D sedemikian adalah bercanggahan dengan perkara 5 Perlembagaan Persekutuan yang mengurniakan ke atas seseorang hak untuk membuat permohonan writ habeas corpus. Dalam keadaan begini, pemohon tidak meneruskan tindakan dengan salahnya dalam memohon untuk writ habeas corpus. Majistret dalam mengeluarkan perintah tahanan telah melakukan pelanggaran prosedur yang serius dengan menafikan hak untuk membuat representasi penuh dan sewajarnya kepada orang yang ditahan. Perintah tahanan tidak berkesan kerana ia adalah perintah yang tidak sempurna dan sebarang tahanan ke atas sesiapa di bawah perintah itu adalah tidak sah oleh kerana ia melanggar perkara 5 Perlembagaan (lihat ms 446G-I dan 447A-D).]
- E
- F

Notes

For cases on habeas corpus, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 300-343.

G

Cases referred to

- Ahmad Bashid Abdul Malek & Yang lain lwn Timbalan Menteri Dalam Negeri Malaysia & Yang lain* [1998] 6 MLJ 112 (distd)
- H *Inspector General of Police & Anor v Teh Guan Teik* Civil Appeal No N-01-7 of 1994 (refd)
- King v The Commanding Officer of Morn Hill Camp, Winchester, ex p Ferguson, The* [1917] 1 KB 176 (distd)
- Teh Guan Teik v Inspector General of Police & Anor* [1998] 3 MLJ 137 (refd)

I

Legislation referred to

Drug Dependants (Treatment and Rehabilitation) Act 1983 s 6
Federal Constitution art 5

P Vickneswaran (NK Ayasamy) for the applicant.

Mohd Abazafree (Federal Counsel, Ministry of Home Affairs) for the respondents.

Mohd Hishamudin J: This is an application for the writ of habeas corpus by the applicant, Mohd Faizol, for his release from detention at the Serenti Rehabilitation Centre. This centre is a governmental institution under the administrative jurisdiction of the Ministry of Home Affairs, for the detention and rehabilitation of drug addicts.

At the commencement of the hearing of this application before me on 17 March 1998, learned federal counsel from the Ministry of Home Affairs, En Abazafree, appearing for the respondents, informed the court that he had a preliminary objection to make.

The objection taken was that the applicant was wrong in procedure in applying for a writ of habeas corpus to secure his release from detention. Learned federal counsel contended that the proper mode of action was for the applicant to apply for a writ of certiorari. I directed counsel of both sides to submit written submissions on the point raised in the preliminary objection.

Having considered the written submissions and the affidavits, I shall now give my judgment.

First, I shall set out the facts of the case.

The applicant is 24 years old. He is a bachelor. The police arrested him on 2 April 1997. He was taken first to the police station at Kop and thereafter to the police station at Kulim. On the day of arrest (ie 2 April 1997), he was produced before the magistrate at Kulim who then ordered that he be remanded for the purpose of undergoing urine tests.

Subsequently, on 8 April 1997, the magistrate at Kulim issued an order pursuant to s 6(1)(a) of the Drug Dependents (Treatment and Rehabilitation) Act 1983 ('the Act'). I shall set out below the full provisions of s 6 of the Act:

Magistrate's order which may be made on a drug dependant

(1) Where a person who has undergone the tests referred to in sections 3 or 4, and, in consequence of such tests, is certified by a government medical officer or a registered medical practitioner to be a drug dependant, the officer shall produce him, or cause him to appear, before a Magistrate and if the Magistrate, after giving such person an opportunity to make representations—

(a) is satisfied that such person requires to undergo treatment and rehabilitation at a Rehabilitation Centre, order such person to reside at such Centre for a period of two years to undergo treatment and rehabilitation and thereafter to undergo after-care in accordance with the provisions of this Act relating thereto; or

(b) is satisfied that such person's treatment and rehabilitation may be carried out otherwise than at a Rehabilitation Centre, he may order such person to be placed under the supervision of a Rehabilitation Officer for a period of not less than two and not more than three

A years, and to execute a bond with or without sureties, as the Magistrate may determine, to remain under such supervision for such period:

Provided that where such person fails to execute such bond an order under paragraph (a) shall be made against him by the Magistrate.

B (2) An order of supervision under paragraph (b) of subsection (1) shall contain the condition requiring such person to abstain from the dangerous drugs and may contain conditions as to residence, employment, associations, abstention from intoxicating liquor, or attendance at a Day Centre.

C (3) The Magistrate shall, before making an order either under paragraph (a) or (b) of subsection (1), consider a report by a Rehabilitation Officer on such person, a copy of which shall be supplied to such person, and which shall be read out and explained to him.

D (4) In making an order under subsection (1), the Magistrate shall have regard to the circumstances of the case, and the character, antecedents, age, health, education, employment, family and other circumstances of the person against whom the order is proposed to be made.

(5) A certificate under subsection (1) purporting to be signed by a government medical officer or a registered medical practitioner shall be receivable by a Magistrate without proof of the signature thereon, and the Magistrate shall accept it as proof of its contents, unless the contrary is proved.

E It will be observed that the above provision confers on a person produced before a magistrate (under the said section) the right to make a representation. It is implicit that this right must be explained to him by the magistrate. To facilitate the making of the representation, the section imposes a duty on the magistrate to supply (or to cause to be supplied) such person a copy of a report by a rehabilitation officer. In addition, the provision imposes on the magistrate the duty to read and explain (or to cause to be read or explained) to him the contents of the report before making the order.

G The notes of the proceedings before the magistrate are rather brief and sketchy. They read as follows:

8 April 1997

Pegawai pemulihan — En Sarif

Subjek — hadir

H Laporan perubatan — positif morfin — diakui — P1

Laporan sah penagih — diakui — P2

Laporan pegawai pemulihan — difahamkan — P3

Subjek:

Pohon jamin. Kini telah insaf.

I Pegawai pemulihan — syor ke pusat

Mahkamah:

Subjek diperintah ke pusat pemulihan selama dua tahun.

It is, inter alia, alleged in the affidavit in support of the application that the applicant was denied the right to make a full and proper representation by reason of the failure of the magistrate:

- (a) to supply him with a copy of the Rehabilitation Officer's report;
- (b) to read and to explain to him the report; and
- (c) to explain to him of his right to make a representation against the proposed detention.

Having set out the background, I shall now say a few words on habeas corpus. The writ of habeas corpus has its origins in English law. It is the most famous writ in English law. It is called the great writ of liberty. The origin and history of the writ are lost in antiquity. But it takes its name from the two mandatory words *habeas* and *corpus* which it contained at the time when it, in common with all forms of legal process, was framed in Latin. There is, however, ample evidence that it was in use before the days of Magna Carta. There are traces of its existence in the *Yearbook* 48, Ed III 22, and it appears to have been familiar and well understood by the judges in the reign of Henry VI. After a long struggle, it was firmly guaranteed by the famous Habeas Corpus Act of 27 May 1679. The writ of *habeas corpus ad subjiciendum* (that you have the body to submit or answer), which is commonly known as the writ of habeas corpus, is a prerogative process for the securing the liberty of the subject by affording an effective means of immediate release from unlawful or unjustifiable detention, whether in prison or private custody.

I shall now revert to the arguments. It is argued by learned federal counsel that an order under s 6 of the Act, so long as it is proper in form and bears the signature and seal of the magistrate, cannot legally be challenged by way of habeas corpus. It could only be challenged by way of certiorari. He relied on two authorities, namely:

- (a) *The King v The Commanding Officer of Morn Hill Camp, Winchester, Ex parte Ferguson* [1917] 1 KB 176; and
- (b) *Ahmad Bashid Abdul Malek & Yang lain lwn Timbalan Menteri Dalam Negeri Malaysia & Yang lain* [1998] 6 MLJ 112.

With respect, I must strongly disagree. If I were to accept this submission, it would be tantamount to this court taking a step backwards in terms of protecting the liberty of the subjects of this nation. The efficacy of the writ of habeas corpus would be seriously impaired. It would be a radical departure from the existing principles on habeas corpus.

In the context of constitutional law, such a proposition, if accepted, would clearly be contrary to the letter and the spirit of art 5 of the Federal Constitution which guarantees:

Liberty of the person

- (1) No person shall be deprived of his life or personal liberty save in accordance with law.
- (2) Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the

- A complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.

The applicant now before me is complaining that the deprivation of his personal liberty has not been in accordance with the law and that he is being unlawfully detained. The reasons are explained in the affidavit. The

- B above article clearly confers on him the right to make an application for a writ of habeas corpus. In other words, the gravamen, prima facie, satisfies the provisions. In the circumstances, with the greatest respect, it simply does not make sense to me for the federal counsel to argue or even to suggest that anyone in the shoes of the applicant would be proceeding on a wrong footing in applying for a writ of habeas corpus. On my part, in the
- C context of the constitutional protection, I do not see anything exceptional about a purported order of a magistrate pursuant to s 6 of this Act. If a magistrate acted beyond his jurisdiction or committed a serious breach of procedure such as denying the potential detainee the right to make a full and proper representation, as has been alleged in the present case, then the
- D purported order would be of no effect — it is a defective order, and any detention of a person under that order would be unlawful; it would be contrary to art 5.

- E In fact, there is nothing novel in the submission of learned federal counsel. For, at one time in England, the courts in certain cases insisted on the prisoner applying for a writ of habeas corpus, to apply simultaneously for certiorari. In *Administrative Law* by HWR Wade and CF Forsyth (7th Ed) it is stated (at pp 620–621):

- F Before it was established that all error of law is ultra vires the House of Lords in *Armah's* case indicated that the scope of review on habeas corpus was as wide as that on certiorari; and that, therefore, it extended to mere error on the face of the record, even though made (as was then supposed) within jurisdiction. At one time the prisoner would have to obtain certiorari to quash the detention order at the same time as habeas corpus to secure his release, in order to succeed on this ground. *But to insist upon a separate certiorari was pointless formalism, since the habeas corpus brought the whole question of the validity of the detention before the court.* It therefore became the
- G practice to receive the depositions of evidence as if there had been a certiorari and to treat them as part of the record, in the same way as used to be done in reviewing magistrates' decisions before 1848. If error of law then appeared, habeas corpus would be granted and the detention order would in effect be quashed, just as it might have been quashed on certiorari. (Emphasis added.)

- H With respect, the decision in *Ex parte Ferguson*, cited by learned federal counsel, is irrelevant for that case can be distinguished on the facts. In that case, the complaint was not that there had been a serious breach of procedure on the part of the magistrate who had made the order. There, the complaint was merely that the magistrate making the order, on the
- I merits of the case before him, came to the wrong conclusion.

However, in the present case, the decision of the learned magistrate is not being challenged on the merits. What the applicant is complaining is that there had been a serious breach of procedure.

In fact, the case cited (*Ex parte Ferguson*) is in favour of the applicant in the present case. For, in that case, there is a statement on the law to the following effect (at pp 179–180):

The law on this matter is well stated by Lord Denman CJ in *R v Bolton* [1841] 1 QB 66 at p 72:

‘The case to be supposed is one like the present, in which the legislature has entrusted the original, it may be (as here) the final, jurisdiction on the merits to the magistrates below; in which this court has no jurisdiction as to the merits either originally or on appeal. *All that we can do, when their decision is complained of, is to see that the case was one within their jurisdiction, and that their proceedings on the face of them are regular and according to law.* Even if their decision should upon the merits be unwise or unjust, on these grounds we cannot reverse it.’

It is true that *R v Bolton* was a case of a certiorari, but the same principles apply in the case of a habeas corpus. (Emphasis added.)

The above passage contains two principles. First, the High Court cannot issue a writ of habeas corpus where the complaint is merely that on the merits, the magistrate making the order of detention came to a wrong conclusion. Second, the High Court may issue a writ of habeas corpus if it is shown that the magistrate acted outside his jurisdiction or that the proceeding was irregular or not in accordance with the law.

Now, the same argument that was submitted before me in the present preliminary objection was advanced before Azhar JC (as he then was) in *Ahmad Bashid*. The argument was, however, accepted by the learned judicial commissioner. With respect, I wish to differ for the reasons which I have given above. I just would like to add that in *Ahmad Bashid*, one of the grounds given by the learned judicial commissioner for his decision was the decision of the Court of Appeal in *Inspector General of Police & Anor v Teh Guan Teik* (Civil Appeal No N-01-7 of 1994), but this decision has been overruled by the Federal Court in *Teh Guan Teik v Inspector General of Police & Anor* [1998] 3 MLJ 137.

The preliminary objection is therefore overruled. I shall now proceed to hear the application proper.

(Upon the preliminary objection being overruled, learned federal counsel conceded to the application for a writ of habeas corpus and the court accordingly orders that the applicant be set free.)

Preliminary objection overruled.

Reported by Jafisah Jaafar